

**UNITED STATES – MEASURES AFFECTING IMPORTS OF CERTAIN PASSENGER  
VEHICLE AND LIGHT TRUCK TYRES FROM CHINA  
WT/DS399**

**OPENING STATEMENT OF THE UNITED STATES OF AMERICA  
AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL**

**July 20, 2010**

1. Mr. Chairman, members of the Panel, and staff of the Secretariat: on behalf of the United States, we thank you once again for your ongoing work in this panel proceeding.

2. If one didn't know better, China's submission would make one think this is a dispute under the Safeguards Agreement. It is not. Although China has acknowledged the Protocol does not incorporate the provisions of the Safeguards Agreement or Article XIX of the GATT 1994<sup>1</sup>, it continues to argue that the text of the Protocol incorporates what it refers to as the "common elements" and "basic concepts"<sup>2</sup> of the Safeguards Agreement, and that the "critical context for understanding the meaning of Article 16" is the Safeguards Agreement.<sup>3</sup> China asserts the United States has "little faith in its arguments that Article 16 . . . should be sealed off from other WTO provisions and related jurisprudence."<sup>4</sup> It seems to us that it is China that has little faith in the text of the transitional mechanism.

3. It is not surprising that China has ignored the plain text of the transitional mechanism, which is the text that must be examined here. In this oral statement, we will try to distill the key issues that we believe the Panel needs to address as it considers this dispute. First, we will

---

<sup>1</sup> China Second Written Submission, para. 47.

<sup>2</sup> China Second Written Submission, para. 47.

<sup>3</sup> China Second Written Submission, para. 60.

<sup>4</sup> China Second Written Submission, para. 57.

explain why China’s arguments that the Protocol can only be understood in relation to the Safeguards Agreement is wrong. Second, we will lay out what the transitional mechanism obligations actually are, based on the ordinary meaning of the text. Third, we will set out how China’s claims fit under paragraphs 16.1, 16.3, 16.4, and 16.6 - the paragraphs under which China has raised claims against the United States. Finally, we will address how the United States has met the obligations at issue and why each of China’s claims must fail.

**I. Panel Must Reject China’s Interpretive Approaches**

**A. It is China’s Interpretative Approach that is “Extreme”**

4. In this dispute, the Panel is presented with the task of interpreting text that has never been interpreted. China accuses the United States of “hiding” behind an “extreme interpretation” of paragraph 16 so as to “forestall” any evaluation of the ITC’s determination.<sup>5</sup> However, our so-called “extreme interpretation” is simply one that asks the Panel to interpret the plain meaning of the Protocol in a manner consistent with the customary rules of treaty interpretation, as required by DSU Article 3.2. The United States is not arguing that there are no standards to guide the Panel’s analysis of China’s claims. Instead, we are arguing the Panel should focus on the terms and conditions set out in paragraph 16 of the Protocol. There is nothing extreme or extraordinary about this approach.

5. Rather than focusing on the text of paragraph 16, China seeks to convince the Panel that the transitional mechanism can only be understood in relation to the Safeguards Agreement and

---

<sup>5</sup> China Second Written Submission, para. 1.

that the Panel must exercise a higher level of scrutiny. As we have explained,<sup>6</sup> nothing in the DSU or the customary rules of treaty interpretation supports the proposition that certain agreements or provisions within agreements, should be interpreted more strictly than others. In much the same way, merely characterizing a treaty provision as an “exception” does not by itself justify a “stricter” or “narrower” interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in the context and in the light of the treaty’s object and purpose, or, in other words, by applying the normal rules of treaty interpretation.<sup>7</sup> Likewise, any attempt to identify *a priori* some purpose or context under which text must be interpreted is to put the cart before the horse. China’s novel interpretive theories must be rejected.

6. China’s basic theory seems to be that anything called a “safeguard” measure must by necessity have the Safeguards Agreement as the “default mode.” As a result, China argues that anything that is not expressly set out in the Protocol must by necessity be “filled in” by reference to the disciplines of the Safeguards Agreement. That is simply wrong. Nothing in the text of the Protocol, the DSU, or the customary rules of treaty interpretation support this approach.

7. In its zeal to try to convince the Panel that this is so, China argues that it is certain that the Safeguards Agreement is the “parent” of a transitional measure under the Protocol.<sup>8</sup> China asserts this “parentage” is “logical” and the only “plausible explanation” because the Safeguards

---

<sup>6</sup> U.S. First Written Submission, paras. 63-72.

<sup>7</sup> *EC – Hormones (AB)*, para. 104.

<sup>8</sup> China Second Written Submission, para. 54.

Agreement is the only other place in the WTO agreements where the term “safeguard” is used.<sup>9</sup>

This is simply wrong. The Agreement on Textiles and Clothing contained a “transitional *safeguard* mechanism”<sup>10</sup>, the Agreement on Agriculture likewise contains a “special *safeguard*”<sup>11</sup>, and the General Agreement on Trade in Services contemplates the elaboration of disciplines for “emergency *safeguard* measures.”<sup>12</sup> Therefore, the Safeguards Agreement is not the only other place where the word “safeguard” is used. There may well be a general concept of “safeguards” in the framework of international trade rules, but this does not mean that there is a necessary link between the Safeguards Agreement and the transitional mechanism of the Protocol. Such a link would have had to be established in the text of the Protocol itself. It was not.

8. China seeks further support for its novel “parentage” theory on the references in the Protocol to the Committee on Safeguards.<sup>13</sup> Such references are in the context of notification requirements when various actions under the Protocol are taken.<sup>14</sup> It is not especially noteworthy that the Protocol provides, as a transparency matter, that various actions are to be notified to the WTO Membership. Given that this is a “transitional” safeguard mechanism, and that paragraph 16.1 establishes that one relevant question is whether to apply a measure under the Safeguards

---

<sup>9</sup> China Second Written Submission, para. 52.

<sup>10</sup> Agreement on Textiles and Clothing, Article 6.

<sup>11</sup> Agreement on Agriculture, Article 5.

<sup>12</sup> General Agreement on Trade in Services, Article X.

<sup>13</sup> China Second Written Submission, para. 55.

<sup>14</sup> See Protocol of Accession, paras. 16.1, 16.2, 16.3, 16.6, and 16.8

Agreement, it was logical that notifications would be made to the already existing Committee on Safeguards. This in no way supports China's theory.

9. China also seeks support for its "parentage" theory from the fact that paragraph 16.1 of the Protocol sets out that, in consultations, China and the affected WTO Member may discuss whether the affected Member should pursue application of a measure under the Safeguards Agreement. As we noted in our first written submission, this indicates that the transitional mechanism exists outside and apart from the global safeguards disciplines of the Safeguards Agreement, not the opposite.<sup>15</sup>

\_\_\_\_\_ **B. The Relevance of Panel and Appellate Body Reports Regarding the Safeguards Agreement**

10. China argues that our position regarding the Safeguards Agreement is internally inconsistent because we reference panel and Appellate Body reports regarding that Agreement. It should be evident that China's own argumentation has led us down this path in the first place.

11. Let's be clear on this issue. The Panel may wish to consider the relevant reasoning in panel or Appellate Body reports under the Safeguards Agreement to the extent this Panel finds that they provide helpful guidance relating to terms that are similar to terms in the Protocol. The reasoning in those reports could be useful both to support an argument or to discard an argument. It is for this reason that we will cite in this statement as well to such reports. At the same time, care must be exercised to avoid importing words or obligations from one agreement into the other.

12. It is axiomatic that panel and Appellate Body reports create legitimate expectations

---

<sup>15</sup> U.S. First Written Submission, para. 74.

among WTO Members, and, therefore, should be taken into account where they are relevant to a dispute.<sup>16</sup> However, even with respect to disputes under the same agreement, they are not binding, *except with respect to resolving the particular dispute between the parties to that dispute*.<sup>17</sup> While the reasoning contained in reports may create legitimate expectations, it does not create binding interpretations even with respect to the agreement at issue in the particular dispute. Only the Ministerial Conference and the General Council can issue binding interpretations.<sup>18</sup> There is nothing that requires the Panel to consider panel and Appellate Body reports regarding the Safeguards Agreement. Therefore, it is patently wrong to assert that “the additional language of ‘increasing rapidly’ and ‘a significant cause’ must be given meaning in light of relevant jurisprudence in the context of the *Agreement on Safeguards*.”<sup>19</sup>

### **C.\_\_\_\_Negotiating History**

13. Because China has continued to assert a necessary link between the Protocol and the Safeguards Agreement, the Panel logically asked a question about the negotiating history of the transitional mechanism. China responded by stating that the negotiating history of the Protocol provides no meaningful interpretive guidance.<sup>20</sup> Nonetheless, China states that the negotiating history of the transitional mechanism confirms its interpretation that the Protocol was a “hybrid” that took concepts from the Safeguards Agreement and adapted them for use in the context of

---

<sup>16</sup> Japan Alcohol (AB), para. 108

<sup>17</sup> Id.

<sup>18</sup> Article IX:2 of the Marrakesh Agreement.

<sup>19</sup> China Second Written Submission, para. 60. (Emphasis added).

<sup>20</sup> China Second Written Submission, para. 64.

paragraph 16, thereby confirming the relationship between the Safeguards Agreement and the transitional mechanism.<sup>21</sup>

14. Because the meaning of paragraph 16 is clear from the text, there is no need to have recourse to supplementary means of interpretation. However, to the extent the Panel wishes to confirm this interpretation, the negotiating history of the transitional mechanism confirms our reading of the Protocol. We should be clear that our answer<sup>22</sup> to the question posed by the Panel on this issue was not intended to be an exhaustive explanation of the relevant negotiating history nor did it cite to all the relevant documents.

15. However, even a quick review of the documents in the WT/ACC/SPEC/CHN series demonstrates our point. China alleges that these documents only demonstrate that there were two points of view and the result was a “hybrid” or compromise. Those documents show China sought, but failed, to have the Safeguards Agreement apply to the Protocol, except as otherwise provided in the Draft Protocol.<sup>23</sup> To achieve what China hoped for, the negotiators would have had to include language to that effect in the Protocol, as they did with respect to other WTO disciplines. For example, in the section of the Protocol right before the transitional mechanism, regarding price comparability for subsidies and dumping determinations, the negotiators explicitly stated that the disciplines of Article VI of the GATT 1994, the Antidumping Agreement, and the SCM Agreement apply in proceedings involving imports from China subject

---

<sup>21</sup> China Second Written Submission, para. 64.

<sup>22</sup> U.S. Answers to Panel Questions, paras. 8-15.

<sup>23</sup> See WT/ACC/SPEC/CHN/1/Rev.3, para. 235(a).

to the provisions set out in paragraph 15 of the Protocol.<sup>24</sup> The lack of any similar language in paragraph 16 demonstrates China did not prevail in this regard.

**D. U.S.-China Bilateral and Section 406**

16. We note that China, having invited the Panel to ask about section 406, now argues that section 406, and the U.S.-China Bilateral, are irrelevant. We agree with China’s statement that the “Panel should focus on the text” of paragraph 16.<sup>25</sup> Nonetheless, we have demonstrated that there is a link between the “market disruption” standard in section 406, the U.S.-China Bilateral, and the transitional mechanism. Indeed, it should be clear that that link is stronger than any supposed link between the Safeguards Agreement and the Protocol. We will address this issue in more detail below.

**II. The Panel Should Apply the Standards Contained In the Protocol, Which Are Clear and Straightforward**

17. Before we address the more specific issues raised by China, we would first like to respond to China’s claim that the United States believes that “investigating authorities may do essentially as they wish” to take action under the Protocol and that we believe there are no standards applicable to the U.S. actions under the Protocol.<sup>26</sup> Let us be very clear on this issue: this is not what the United States is arguing.

---

<sup>24</sup> WT/L/432, Section 15, chapeau (“Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“Anti-Dumping Agreement”) and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following . . .”).

<sup>25</sup> China Second Written Submission, para. 147.

<sup>26</sup> *See, e.g.*, China Second Written Submission at para. 1.

**A. Market Disruption Determination**

18. Rather than arguing the Protocol imposes no standards, the United States has consistently made clear the Protocol imposes a set of specific obligations on a Member with respect to the market disruption determination. Because China continues to misstate the U.S. position, we will set out, in short and simple terms, the standards the Panel should apply when reviewing the ITC’s determination. Unlike China’s attempt to unilaterally create standards unsupported by the plain text of the Protocol, the standards are clear from the plain meaning of the text at issue.

19. China has raised claims with respect to the market disruption determination under paragraphs 16.1 and 16.4 of the Protocol. As we have explained,<sup>27</sup> paragraph 16.1 sets forth the general conditions under which a Member is authorized to seek consultations with China. The obligations regarding the ITC’s market disruption determination are found in paragraph 16.4. While paragraph 16.1 provides context for the interpretation of paragraph 16.4, it does not set out a general obligation with respect to the market disruption determination. Since China is not arguing that the United States acted inconsistently with respect to its consultations obligations, there is no basis to find any inconsistency with paragraph 16.1.

20. Before addressing paragraph 16.4, we note that paragraph 16.5 of the Protocol provides important context for interpreting the substantive obligations of the Protocol. Paragraph 16.5 provides that the Member imposing a measure must provide written notice of the decision, “including the reasons for such measure.” This can be properly interpreted to mean that a Member must provide a reasoned explanation for its market disruption findings. China did not

---

<sup>27</sup> U.S. Answers to Panel Questions, paras. 5, 51 - 53.

raise a claim under paragraph 16.5, so any specific findings under paragraph 16.5 would be beyond the Panel’s terms of reference. However, it would be equally improper to impose a higher procedural standard than is provided in paragraph 16.5. This is precisely what China has tried to persuade the Panel to do by arguing that the same “standard of review” used in the Safeguards Agreement must be used here.

21. Paragraph 16.4 sets out the standards that must be satisfied to make a finding that market disruption exists. The first sentence of paragraph 16.4 explains that the Member must find: (1) that imports are increasing rapidly, either absolutely or relatively; (2) so as to be a significant cause; (3) of material injury or threat thereof. We note that China has conceded that the industry was materially injured during the period of investigation. Therefore, we will not address the standards for determining whether the industry was materially injured under the Protocol in our discussion below.

22. First, the Panel is expected to assess whether the ITC reasonably found that imports from China were “increasing rapidly, either absolutely or relatively” over the period of investigation.<sup>28</sup> As the United States has noted,<sup>29</sup> “rapid” is defined as “progressing quickly; developed or completed within a short time.”<sup>30</sup> Thus, the Panel should assess whether the ITC reasonably concluded that the growth in Chinese imports had “progressed quickly” over the period of investigation.” And, as we have made clear in our submissions, the ITC’s finding was fully consistent with this standard.

---

<sup>28</sup> Protocol of Accession, para. 16.4.

<sup>29</sup> See, e.g., U.S. First Written Submission, para. 87.

<sup>30</sup> *New Shorter Oxford English Dictionary* (2007) at 2463.

23. The Protocol also requires the ITC to determine that Chinese imports are “a significant cause” of material injury to the industry.<sup>31</sup> Since the word “significant” is defined as meaning something that is “important,” “notable” or “consequential,”<sup>32</sup> the Panel should assess whether the ITC reasonably concluded that imports from China were a “notable” or “important” cause of material injury. Since the ITC has consistently stated that it must assess whether there is a “direct and significant causal link” between the Chinese imports and material injury,<sup>33</sup> the ITC’s analysis is again consistent with the requirements of the Protocol.

24. Finally, the second sentence of paragraph 16.4 directs a Member to evaluate “objective factors, including the volume of such imports, the effect of imports on prices for like or directly competitive articles, and the effect of imports on the domestic industry producing like or directly competitive products.” The Protocol does not otherwise provide specific guidance on how the Member should conduct this analysis. Accordingly, a Member has the discretion to adopt and utilize reasonable analytical approaches to perform its analysis, as long as they address the specific factors set forth in the Protocol and are not otherwise inconsistent with the Protocol.<sup>34</sup> Thus, the Panel should assess whether the ITC’s analytical approach in its investigation is consistent with the Protocol and whether the ITC reasonably addressed the three factors specified in paragraph 16.4 of the Protocol. Once again, the ITC’s analytical approach in this

---

<sup>31</sup> See, e.g., U.S. First Written Submission, para. 156.

<sup>32</sup> New Shorter Oxford English Dictionary, p. 2860.

<sup>33</sup> ITC Report, p. 18. Exhibit US-1. See also *Pedestal Actuators from China*, Inv. No. TA-421-1, USITC Pub. 3557 (Nov. 2002) at p. 18, Exhibit US-15; *Certain Ductile Iron Waterworks Fittings from China*, Inv. No. TA-421-4, USITC Pub. 3657 (Dec. 2003) at pp. 15-16. Exhibit US-16.

<sup>34</sup> See, e.g., *EC -Tube (AB)*, para. 189.

investigation satisfies this standard.

25. These are the obligations contained in the Protocol regarding the market disruption determination. They are firmly rooted in the text of the Protocol. It is not the United States, but China that is taking a position not based in the language of the Protocol. Unlike the United States, China continues to ask the Panel to apply standards that are not contained in the text of the Protocol itself, that are more stringent than those in the Protocol, or that are derived from the Safeguards Agreement. The Panel should reject China’s attempts to have the Panel re-write the Protocol in this manner.

**\_\_\_\_\_ B. The ITC Reasonably Found Chinese Imports Were Rapidly Increasing**

26. We would now like to turn to the question of “increasing imports.” We believe that it is not necessary, at this point, to go over the import data in detail again. The charts in our submissions make it abundantly clear that imports of tires from China increased rapidly on both an absolute and a relative basis.<sup>35</sup> The increases were rapid and sustained, and occurred in every year of the ITC’s five-year period of investigation. Moreover, the largest increases, in relative terms, occurred in the last two years of the period.<sup>36</sup>

27. It is noteworthy that China has not cited a *single* dispute where an increase in imports as large and rapid as the increase in this case was found to be insufficient to satisfy the increased imports standard of the Safeguards Agreement. As the United States has explained, in a number of disputes, increases in imports were clearly smaller and less sustained than the increase here,

---

<sup>35</sup> U.S. First Written Submission, paras. 108-111, U.S. Second Submission, paras. 20-21.

<sup>36</sup> ITC Report, pp. 11-12 and Table C-1. Exhibit US-1.

but were found to satisfy the “increased imports” standard set forth in the Safeguards Agreement.<sup>37</sup> This assessment needs to be performed on a case-by-case basis, and the standard under the Safeguards Agreement is different, but these findings can be instructive for the Panel.

28. Finally, we would like to clarify a significant misstatement in China’s second submission, which China has made throughout this proceeding. China contends that imports showed the “smallest rate [of increase] of the period” in 2008.<sup>38</sup> This is incorrect. Measured relative to consumption or to production, the increase in imports in 2008 was the second highest annual increase of the period. China attempts to obscure this fact by comparing the increase in 2008 to the average annual increase for the preceding four years, which includes the large increase in 2007. Of course, the average increases cited by China are skewed significantly upwards by the enormous increase in imports that occurred in 2007.<sup>39</sup>

**1. The “Increasing Imports” Requirement Can Only Be Properly Understood In the Context of Its Link to “Material Injury”**

29. China has argued in this dispute that the Protocol contains a stricter “increased imports” standard than the Safeguards Agreement. We have shown that China’s position is untenable. Among the reasons for this is that the language of the Protocol links the issue of rapidly increasing imports to material injury, which is a lower standard of injury than the serious injury standard under the Safeguards Agreement. Paragraph 16.4 provides the increase in imports must be rapid enough “so as to be a significant cause of material injury, or threat of material injury” to

---

<sup>37</sup> U.S. First Written Submission, para. 112, fn. 212.

<sup>38</sup> China Second Written Submission, para. 112.

<sup>39</sup> China Second Written Submission, para. 113.

the industry. The concept of increased imports does not stand alone in the text, as China claims, but is linked to material injury. The Appellate Body’s report in *US – Steel Safeguards* provides support for recognizing this linkage. Therefore, a lesser injury standard means that a smaller increase in imports may be sufficient to cause material injury than to cause serious injury.

30. China attempts, in its second written submission, to deny this linkage between increased imports and the specified quantum of injury. China’s arguments are unconvincing. First, it claims that, in *US – Steel Safeguards*, the Appellate Body was linking increased imports only to causation and not to serious injury.<sup>40</sup> But China’s interpretation is at odds with the Appellate Body’s explanation in *US – Steel Safeguards*. In its discussion, the Appellate Body explained that “whether an increase in imports is recent, sudden, sharp and significant enough to cause or threaten to cause serious injury are questions that are answered as the competent authorities proceed with the remainder of their analysis (i.e., the consideration of serious injury/threat and causation).”<sup>41</sup>

31. China’s second argument is just as unconvincing. Citing only to paragraph 16.1, it claims that “the Protocol does not link “increasingly rapidly” to “material injury,” but rather to “market disruption.”<sup>42</sup> Of course, China overlooks the fact that the linkage between increasing imports and injury is clear in paragraph 16.4, which states that imports must be rapid enough “so as to be a significant cause of material injury.” Like the Safeguards Agreement, the nature of the increase is specifically linked to the level of injury specified in the Protocol.

---

<sup>40</sup> China Second Written Submission, para. 95.

<sup>41</sup> *US – Steel Safeguards* (AB), para. 346.

<sup>42</sup> China Second Written Submission, para. 96.

**2. China’s Argument That Paragraphs 16.1 and 16.4 Impose Different Increasing Imports Standards on a Member Is Unfounded**

32. In its second submission, China has made the extraordinary claim that the “increasing rapidly” standard in paragraph 16.4 is distinct from the “in such increased quantities” standard in paragraph 16.1 and that paragraph 16.4 imposes an additional and different requirement.<sup>43</sup>

Again, China’s interpretation of the Protocol is unfounded. Under the customary rules of treaty interpretation, the terms of a treaty must be given their ordinary meaning, in the context of the language of the treaty. In the Protocol, the “increased imports” language of paragraph 16.1 and the “rapidly increasing” imports language of paragraph 16.4 relate to the very same issue, that is, the issue of whether increased imports from China have caused market disruption. Accordingly, the only reasonable way to interpret the two phrases is to do so in a manner that reconciles the meaning of the two phrases. It makes no sense to contend that the two phrases were intended to have entirely different meanings, as China contends.

**3. The ITC’s Decision Not to Seek Data for the First Quarter of 2009 Was Reasonable**

33. In response to China’s argument that the ITC should have collected data for the first quarter of 2009, we explained that the need to seek interim period data depends on the nature and complexities of an investigation, including the length of time between the filing of the petition and the end of the interim quarter, and the number of parties from whom data must be sought.<sup>44</sup> In this case, only 20 days had elapsed since the end of that quarter when the petition was filed,

---

<sup>43</sup> China Second Written Submission, paras. 99-101.

<sup>44</sup> U.S. First Written Submission, para. 132.

and information would have had to have been collected from approximately 80 U.S. producers, importers and foreign producers.<sup>45</sup> The ITC reasonably concluded that “a relatively complete data series for that period would not have been available in time for use in this investigation.”<sup>46</sup>

34. China continues to portray the ITC’s decision not to collect interim data as inconsistent with its practice in other cases.<sup>47</sup> Even aside from the fact that the issue here is consistency with a Member’s obligations under paragraph 16 rather than consistency with a Member’s domestic practice in other contexts, we have shown, on a case-by-case analysis, that there was no merit to China’s argument.<sup>48</sup> China’s arguments to the contrary, rest on nothing more than hyperbole and factual inaccuracies. For example, China claims that “the USITC acknowledged that imports from China declined in the first quarter of 2009.”<sup>49</sup> The ITC did no such thing – it simply explained that, without data on U.S. production and apparent consumption, it had no way of knowing whether imports had increased on a relative basis in the first quarter of 2009.<sup>50</sup> China also claims that the ITC has “*in many cases* gathered interim data for a first quarter during an even tighter time frame.”<sup>51</sup> In fact, as we have shown, in *almost all* of the cases cited by China in which interim data was collected, the period of time that elapsed since the end of the quarter was

---

<sup>45</sup> U.S. First Written Submission, para. 133.

<sup>46</sup> ITC Report, p. 12 n. 55, Exhibit US-1.

<sup>47</sup> China First Written Submission, paras. 139-141.

<sup>48</sup> U.S. First Written Submission, paras. 135-138.

<sup>49</sup> China Second Written Submission, para. 123.

<sup>50</sup> ITC Report, p. 12 and n. 55. Exhibit US-1.

<sup>51</sup> China Second Written Submission, para. 124 (emphasis added).

longer than 20 days.<sup>52</sup> China also claims that seeking interim data cannot be burdensome on responding firms because, in China's words, "it aligns with the quarterly reporting of financial and management data so commonly collected by businesses."<sup>53</sup> China completely misses the point. It may well be that businesses collect quarterly data, but the question is how soon after the close of a quarter all of this data has been compiled by all of the firms involved. Nothing in paragraph 16 imposes the standard that China seeks, and we wonder if the obligation China would like to read into the Protocol is one that could be met by all Members.

35. Let me turn for a moment to China's argument that the ITC should have de-constructed its annual data and engaged in an alternative analysis based on quarterly data. We have already explained the shortcomings of China's approach.<sup>54</sup> Although we do not intend to reiterate them at length here, China's methodology obscures the fact that imports were higher in 2007 and 2008 than in previous years. China's approach also has the potential for distortions because it compares successive calendar quarters. If China had compared the comparable quarters of 2008 with those of 2007, three of the four quarterly comparisons would have shown increases in 2008.<sup>55</sup> We would like also to note that China has not been able to point to a single case under the Safeguards Agreement where a panel or the Appellate Body has gone beyond the analysis of annual data by an administering authority and replaced it with a dis-aggregated analysis involving shortened time-frames.

---

<sup>52</sup> U.S. First Written Submission, para. 135-138, and Exhibits US-11 and US-14.

<sup>53</sup> China Second Written Submission, para. 124.

<sup>54</sup> U.S. First Written Submission, paras. 123-127.

<sup>55</sup> U.S. First Written Submission, paras. 124-126.

### **III. China Has Not Carried Its Burden On Its “As Such” Claim**

#### **A. The U.S. Statute Is Fully Consistent With the Protocol**

36. We will now turn to China’s “as such” challenge to the U.S. statute. At this point, the United States has established the U.S. statute’s definition of “significant cause” is consistent with the language of the Protocol itself, the ordinary meaning of the word “cause” and “causal link,” and Appellate Body’s reasoning under the Safeguards Agreement.<sup>56</sup> As the United States has noted,<sup>57</sup> the U.S. statute requires the ITC to find a “direct and significant causal link” between Chinese imports and material injury, and does not permit the ITC to find the necessary causal link if Chinese imports are a “minimal” or “unimportant” cause of material injury. This is fully consistent with the Protocol.

37. China has done nothing to seriously rebut these points. China remains unable to explain exactly why it believes that the ordinary meaning of the words “cause” and “contribute” show that the U.S. statute’s causation standard supposedly “weakens” the “significant cause” standard of the Protocol. China has failed to address the language in the Protocol providing that Chinese imports may be “a significant cause” of material injury, which is language establishing that Chinese imports can be one of several factors “contributing significantly” to material injury. Finally, China has not seriously explained why the Appellate Body’s statement in *US – Wheat Gluten* that a factor can be a “cause” of injury if it “contribute[s] to “bringing about,

---

<sup>56</sup> U.S. First Written Submission, paras. 148-186; U.S. Second Written Submission, paras. 38-57, U.S. Answers to Panel Questions, paras. 17-19, 37-41, 54-62.

<sup>57</sup> U.S. First Written Submission, paras. 148-186; U.S. Second Written Submission, paras. 38-57, U.S. Answers to Panel Questions, paras. 17-19, 37-41, 54-62.

“producing,” or “inducing” that degree of injury does not provide helpful guidance here.<sup>58</sup>

Given this, China has failed to carry its burden on this issue. Nonetheless, we would like to take the opportunity to address several mistaken arguments made by China on this issue.

**B. China Continues to Misrepresent the U.S. Arguments**

38. First, it is important to point out that China continues to misstate the U.S. arguments on the “as such” issue. For instance, China claims the U.S. arguments “rest fundamentally on the assertion that, because Article 16 of the Protocol does not define [the phrase ‘significant cause,'] the United States may adopt its own ‘methodologies or standards’ to determine whether imports from China are a significant cause of material injury.”<sup>59</sup> This is simply not true. The U.S. “fundamental” point has been, and remains, that the terms “a significant cause” and “contribute significantly,” as used in the Protocol and the U.S. statute, have the same meaning and scope.<sup>60</sup> China’s assertion that the United States believes that it may change the “significant cause” standard is just plain wrong.

39. China also asserts that the United States has argued that the “significant cause” standard is clearly lower than the “genuine and substantial” standard under the Safeguards Agreement and the causation standard of the Antidumping and Subsidies Agreements.<sup>61</sup> Again, this is incorrect. In this proceeding, the United States has taken no position with respect to the relationship of the “significant cause” standard of the Protocol to the “causal link” standard of the Antidumping and

---

<sup>58</sup> *US – Wheat Gluten (AB)*, para. 67.

<sup>59</sup> China Second Written Submission, para 127.

<sup>60</sup> *E.g.*, U.S. First Written Submission, paras. 171-175; U.S. Second Written Submission, paras. 41-47.

<sup>61</sup> China Second Written Submission, para 127.

Subsidies Agreements.

40. The United States has also not stated that the “significant cause” standard of the Protocol is clearly lower than the “genuine and substantial” causal link standard under the Safeguards Agreement. The United States has consistently explained that it would not be useful for the Panel to try to determine whether the “significant cause” standard of the Protocol is the same as, or lower than, the “genuine and substantial” standard under the Safeguards Agreement.<sup>62</sup> Instead, the United States believes the Panel should give the word “significant” its ordinary meaning of “notable” or “important,” and that the Panel should assess whether the ITC reasonably concluded that rapidly increasing imports from China were a “significant,” that is, “notable” or “important,” cause of material injury to the domestic industry.

41. Finally, China continues to argue that the United States believes a Member may find Chinese imports to be a cause of material injury if they make a “mere” or “minimal” contribution to injury.<sup>63</sup> The United States has never indicated that the ITC may find Chinese imports to be a “significant cause” of material injury if they make a “mere contribution” to that injury. Instead, the U.S. statute specifically requires the ITC to determine that Chinese imports “contribute significantly” to the material injury being suffered by the industry.<sup>64</sup> The ITC itself has consistently stated the U.S. statute requires a “direct and significant causal link” between Chinese

---

<sup>62</sup> *E.g.*, U.S. First Written Submission, paras. 177-179; U.S. Second Written Submission, paras. 48-49; U.S. Answers to Written Panel Questions, paras. 18-19.

<sup>63</sup> China Second Written Submission, para. 138.

<sup>64</sup> 19 U.S.C. §2451(c)(2). Exhibit US-3.

imports and material injury,<sup>65</sup> and that a “minimal” or “unimportant” contribution to injury does not satisfy the “significant cause” standard of the statute.<sup>66</sup> China’s arguments are entirely unfounded.

**C. China Has Failed to Establish That The U.S. Statute’s Definition of “A Significant Cause” Weakens the Protocol’s Standard**

42. China also continues to argue that the language of the U.S. statute which provides that Chinese imports “need not be equal to or greater than any other cause” “allows an investigating authority to determine that even a minimal cause ... could still be considered as a ‘significant cause.’”<sup>67</sup> As the United States has explained in detail, however, this is not the meaning of this statutory phrase. As we noted in our written submissions,<sup>68</sup> the statutory phrase does not allow the ITC to find that Chinese imports are a “significant cause” even if they are a lesser cause of injury than a minimal cause of injury. Such a reading would be clearly inconsistent with the requirement of the U.S. statute that Chinese imports “contribute significantly” to material injury.<sup>69</sup>

43. Instead, as the ITC has consistently stated, the language cited by China makes clear that imports from China need not be the most important cause, or equal in effect to the most

---

<sup>65</sup> ITC Report, p. 18. Exhibit US-1. *See also Pedestal Actuators from China*, Inv. No. TA-421-1, USITC Pub. 3557 (Nov. 2002) at p. 18, Exhibit US-15; *Certain Ductile Iron Waterworks Fittings from China*, Inv. No. TA-421-4, USITC Pub. 3657 (Dec. 2003) at pp. 15-16. Exhibit US-16.

<sup>66</sup> ITC Report, p. 18. Exhibit US-1. *See also Pedestal Actuators from China*, Inv. No. TA-421-1, USITC Pub. 3557 (Nov. 2002) at p. 18, Exhibit US-15; *Certain Ductile Iron Waterworks Fittings from China*, Inv. No. TA-421-4, USITC Pub. 3657 (Dec. 2003) at pp. 15-16. Exhibit US-16.

<sup>67</sup> China Second Written Submission, para. 137.

<sup>68</sup> U.S. Second Written Submission, para. 57.

<sup>69</sup> 19 U.S.C. §2451(c)(2). Exhibit US-3.

important cause, of material injury to the industry.<sup>70</sup> This concept is consistent with the Protocol, which does not require that imports be the sole, primary, or most important cause of injury.<sup>71</sup> We note that China’s claim that the ITC may find Chinese imports to be “a significant cause” of material injury if they contribute only minimally to material injury is not based on the language of section 421, any pertinent legislative history, or the ITC’s own expressed interpretation of this statutory language. It simply represents China’s own unique and mistaken reading of the statute.

44. China also asserts that the legislative history of section 406 – which was the model for the causation standards included in the Protocol and section 421 – indicates that the U.S. statute weakens the causation standard of the Protocol.<sup>72</sup> In its answers to the Panel’s written questions and second written submission, China notes the legislative history of section 406 states that the “term ‘significant cause’ is intended to be an easier standard to satisfy than that of the ‘substantial cause,’” standard of section 201, the U.S. global safeguards statute. As the United States explained in its second written submission, however, China seriously misconstrues the legislative history of section 406, and the relationship of the causation standards of sections 406 and 201.

45. In citing section 406's legislative history, China has neglected to mention that the “substantial cause” standard of section 201 contains an additional element that necessarily makes

---

<sup>70</sup> ITC Report, p. 18. Exhibit US-1. See also *Pedestal Actuators from China*, Inv. No. TA-421-1, USITC Pub. 3557 (Nov. 2002) at p. 18, Exhibit US-15; *Certain Ductile Iron Waterworks Fittings from China*, Inv. No. TA-421-4, USITC Pub. 3657 (Dec. 2003) at pp. 15-16. Exhibit US-16.

<sup>71</sup> Protocol of Accession, paras. 16.1 and 16.4.

<sup>72</sup> U.S. Answers to Panel’s Written Questions, paras. 21-27.

it higher than section 406's "significant cause" standard. In section 201, the Congress defines "substantial cause" to mean "a cause which is important and not less than any other cause" of serious injury to an industry.<sup>73</sup> As the ITC has consistently explained in its global safeguards determinations, this standard means that, under section 201, "increased imports must be both an important cause of the serious injury or threat and a cause that is equal to or greater than any other cause."<sup>74</sup> Put another way, under section 201, the ITC must determine that imports are both an important cause of injury to the industry and are a cause of serious injury greater than, or equal to, any other single factor injuring the industry in an important way.

46. Accordingly, under U.S. law, section 406's "significant cause" standard is not considered lower than the section 201 standard because the term "significant cause" somehow has an inherent meaning that connotes a lower causal link standard than "substantial cause." Instead, section 406's standard is lower than section 201's standard because section 406 does not require the ITC to conclude that the injury caused by the subject imports is greater than or equal to the injury caused by any other factor injuring the industry.<sup>75</sup> Instead, section 406 requires the ITC to find only that the subject imports – that is, Chinese imports, are a significant cause of material injury or threat to the industry.<sup>76</sup>

47. It is telling that China has now disavowed its unambiguous statement from the first panel

---

<sup>73</sup> 19 U.S.C. §2252(b)(1)(B). Exhibit US-32.

<sup>74</sup> *Steel*, Inv. No. TA-201-73, USITC Pub. 3479 at 34 (emphasis added), Exhibit US-33; *Lamb Meat*, Investigation No. TA-201-68, USITC Pub. 3176 (April 1999) (Excerpts), Exhibit US-34; *Wheat Gluten*, Investigation No. TA-201-67, USITC Pub. 3088 (March 1998) (Excerpts), Exhibit US-35.

<sup>75</sup> Compare 19 U.S.C. §2436(e)(B)(ii) (Exhibit US-26) with 19 U.S.C. §2252(b)(1)(B) (Exhibit US-32).

<sup>76</sup> 19 U.S.C. §2436(e)(B)(ii). Exhibit US-26.

meeting that the causation standard of section 421 was derived from the causation standard of section 406.<sup>77</sup> As the Panel is aware, at the first meeting, China’s delegate stated correctly that section 421’s “‘contributes significantly’ test was derived from Section 406.” China asserted this standard represented a significantly looser standard than the one contained in the Protocol.<sup>78</sup> In response to an inquiry from the Panel asking for further information on this matter, the United States explained that:

- Section 406 predated both China’s accession to the WTO and the enactment of section 421 by Congress;
- Section 406 contains the same causation standard as section 421;
- When the United States negotiated its bilateral accession agreement with China when China sought to accede to the WTO, the United States negotiated a transitional safeguard mechanism with China;
- During those negotiations, the United States modeled the causation provisions of the transitional safeguard mechanism on the standards contained in section 406;
- When the Protocol of Accession for China was negotiated amongst all WTO members, the transitional mechanism negotiated in the US-China bilateral accession agreement was included in the Protocol of Accession, on an almost verbatim basis;
- As a result, the causation standard of section 406, which defines “a significant

---

<sup>77</sup> China Second Written Submission, paras. 140-147.

<sup>78</sup> Written Questions from Panel, question 6.

- cause” as “a cause which contributes significantly to the material injury of the domestic industry, but need not be equal to or greater than any other cause,” was the model for the causation standard of the Protocol and section 421; and, finally,
- China was the subject of several investigations under section 406 before its accession to the WTO. It was therefore aware that the term “significant cause” was defined as meaning a factor that “contributes significantly” to material injury under section 406.<sup>79</sup>

As one can see, this sequence shows that the causation standards contained in section 406, section 421 and the Protocol were all similar, and that China was well aware that the term “significant cause” was equivalent to the term “significantly contributes” when it agreed to the Protocol and the language of paragraph 16. It should be very clear now why China would now like to disavow its statement at the first Panel meeting that the causation standard of section 421 was “derived from” the standard contained in section 406.

48. Finally, China now asserts that it “strongly doubts” that, in *US – Wheat Gluten*, “the Appellate Body was focused [in that statement] on the particular meaning of the word “contribute” and how this might relate to other formulations in relation to causation.”<sup>80</sup> In that report, of course, the Appellate Body stated that the words “cause” and “causal link” indicate that a factor can be a “cause” of the requisite level of injury if it “contribute[s] to “bringing about, “producing,” or “inducing” that degree of injury.<sup>81</sup> China’s reading of this language is mistaken.

---

<sup>79</sup> U.S. Answers to Panel Questions, paras. 21-27.

<sup>80</sup> China Second Written Submission, para. 149.

<sup>81</sup> *US – Wheat Gluten (AB)*, para. 67.

Despite China’s assertions to the contrary, the Appellate Body’s analysis focused precisely on whether the word “cause” meant that a factor could “contribute” to the requisite level of injury under the Safeguards Agreement.<sup>82</sup>

49. In *US – Wheat Gluten*, the reviewing Panel found that, under the Safeguards Agreement, “increased imports, looked at ‘alone,’ ‘in and of themselves,’ or ‘per se,’ must be capable of causing injury that is ‘serious.’”<sup>83</sup> The United States appealed this finding to the Appellate Body, arguing that the word “‘cause’ means ‘to bring about a result, *whether alone or in combination with other factors* – not to ‘cause on its own.’”<sup>84</sup> The Appellate Body agreed, stating that the words “cause” and “causal link” contemplate a “relationship of cause and effect such that increased imports contribute to ‘bringing about,’ ‘producing’ or ‘inducing’ the serious injury.”<sup>85</sup> The Appellate Body also explained that, under the Safeguards Agreement, “the ‘causal link’ between increased imports and serious injury may exist, *even though other factors are also contributing, ‘at the same time,’ to the situation of the domestic industry.*”<sup>86</sup> In other words, the concept of “contribution” was central to the Appellate Body’s reasoning on this issue, despite China’s claims to the contrary.

#### **IV. The ITC’s Causation Analysis, As Applied, Was Consistent with the Protocol**

50. Now we will turn to the specifics of the ITC’s causation analysis. In its second written

---

<sup>82</sup> *US – Wheat Gluten (AB)*, paras. 64-67.

<sup>83</sup> *US – Wheat Gluten (AB)*, para. 66.

<sup>84</sup> *US – Wheat Gluten (AB)*, para. 64.

<sup>85</sup> *US – Wheat Gluten (AB)*, para. 66.

<sup>86</sup> *US – Wheat Gluten (AB)*, para. 66 (emphasis in original).

submission, China has largely repeated the same arguments it made in its first submission.

China's arguments were not persuasive when China first made them, and have become no more persuasive by repetition. Since China continues to misstate the record and the requirements of the Protocol, we would like to correct the more significant of its misstatements.

**A. The ITC Reasonably Found Chinese and U.S. Tires Were Competing in the U.S. Market**

51. In its most recent submission, China continues to challenge the ITC's finding that Chinese and U.S. tires were competing significantly in the market. At its core, China contends the replacement market consisted of three separate tire categories where there was little competition between the U.S. and Chinese tires.<sup>87</sup> China continues to claim, for instance, that imports from China were allegedly absent from 74 percent of the market.<sup>88</sup>

52. China's claims are belied by the record.<sup>89</sup> The record showed that, while most market participants agree the replacement market could be divided into three general categories, there was no consensus among producers, importers, and purchasers on how to define the three categories or on the tire brands that were included in the three categories.<sup>90</sup> Since market participants could not agree on how the categories were defined or on what brands belonged in each category, China has little basis for claiming that there was a clear dividing line between the three categories that somehow attenuated competition between Chinese and U.S. tires.

---

<sup>87</sup> Second Written Submission of China, paras. 188-201.

<sup>88</sup> Second Written Submission of China, para. 1188.

<sup>89</sup> ITC Report, pp. 27-28. Exhibit US-1.

<sup>90</sup> ITC Report, pp. 21 and 27. Exhibit US-1.

53. The record showed there was competition between the Chinese and U.S. tires within the three tiers of the U.S. tires market.<sup>91</sup> For example, in 2008, at least 18.6 percent of the U.S. industry's shipments of tires were made in category 3 of the replacement market, the category where the largest percentage of the Chinese tires were sold.<sup>92</sup> Moreover, in category 2, the quantity of Chinese shipments was 64.3 percent of the quantity of China's shipments in category 3.<sup>93</sup> The record also showed Chinese imports held five percent of the OEM segment by the end of the period and were sold in category 1 of the market as well.<sup>94</sup> As the ITC stated, there clearly was competition between U.S. and Chinese tires in all segments of the market. Indeed, we would add, the dissenting Commissioners agreed with the majority that there was significant competition within the tier 2 and 3 categories of the market,<sup>95</sup> which is a finding of the dissent China has so far conveniently overlooked in its submissions.

54. The record also showed that the large majority of market participants reported that Chinese imports and U.S. tires were always or frequently interchangeable.<sup>96</sup> Clearly, the market participants themselves did not find that market segmentation in the replacement sector limited the interchangeability of the subject and U.S. tires.<sup>97</sup> Since Chinese imports and U.S. tires were

---

<sup>91</sup> ITC Report, p. 27.

<sup>92</sup> ITC Report, p. 27. Exhibit US-1.

<sup>93</sup> ITC Report, p. 27. Exhibit US-1.

<sup>94</sup> ITC Report, pp. 21-27. Exhibit US-1.

<sup>95</sup> ITC Report, pp. 64 and 50-51. Exhibit US-1.

<sup>96</sup> ITC Report, Table V-6. Exhibit US-1.

<sup>97</sup> ITC Report, Table V-6. Exhibit US-1.

close substitutes, it is hardly surprising that the industry lost 13.7 percentage points of market share over the period at the same time that subject imports gained 12.0 percentage points of market share.<sup>98</sup>

55. Just in case there was any doubt that U.S. produced tires and Chinese tires were considered competitive in the marketplace, one of the Chinese respondents' own hearing witnesses confirmed that there were not significant differences between category 1 and category 3 tires, stating that:

Within this third tier, our tires cover the same broad spectrum of size and performance as are offered in the first two segments. When all the advertising and marketing is stripped away, our tires are just as well made, just as safe, and just as carefully inspected as brand names. Our tires simply do not have a flag or secondary brand name on their sidewall.<sup>99</sup>

In other words, the major differences between category 1 and category 3 tires came down to brand-based marketing and price.<sup>100</sup> The three categories did not, as China claims, act as a bar to competition between Chinese and U.S. tires between the three categories.

56. Finally, China continues to make the mistaken assertion that Chinese tires accounted for a negligible share of the OEM market.<sup>101</sup> The ITC correctly found otherwise. China's claim may have been true at the start of the period in 2004, when Chinese imports accounted for 0.8 percent

---

<sup>98</sup> ITC Report, p. 24. Exhibit US-1.

<sup>99</sup> ITC's Hearing Tr. at 246 (Borgman) (Emphasis added). Exhibit US-30

<sup>100</sup> ITC Report, p. 9 n.41. Exhibit US-1.

<sup>101</sup> Second Written Submission of China, paras. 192-197.

of the OEM market,<sup>102</sup> but it was certainly not true in 2008, when Chinese imports into the OEM sector rose to a period high of 2.3 million tires and occupied 4.9 percent of the OEM segment.<sup>103</sup> Moreover, this growth in Chinese imports in the OEM market came at the expense of the domestic industry, whose shipments to the OEM market declined to a period low in 2008.<sup>104</sup> Given this, the ITC reasonably concluded that Chinese import trends in the OEM market supported its view that there was growing and significant competition between Chinese and U.S. tires.

**B. The ITC Reasonably Found a Coincidence Between the Growth in Imports and Declines in the Industry's Condition**

57. In its second written submission, China also continues to make the claim that there was no coincidence whatsoever between increasing Chinese import volumes and declines in the industry's condition. The United States disagrees. The record shows a direct correlation between the consistent growth in Chinese imports over the period and significant declines in the industry's market share, capacity, production, shipment quantities, net sales quantities, profitability, capacity utilization, productivity, and employment levels.<sup>105</sup>

58. First, as the ITC found, the record showed that the Chinese imports increased rapidly, both absolutely and relatively, each year of the period, and reached their highest levels in 2008,

---

<sup>102</sup> ITC Report, Tables V-2 and V-3. Exhibit US-1.

<sup>103</sup> ITC Report, Tables V-2 and V-3. Exhibit US-1.

<sup>104</sup> ITC Report, Tables V-2 and V-3. Exhibit US-1.

<sup>105</sup> ITC Report, pp. 22-29. Exhibit US-1.

the final year of the period.<sup>106</sup> Furthermore, Chinese imports undersold U.S. tires consistently throughout the period of investigation, and at increasingly large underselling margins.<sup>107</sup>

59. As Chinese imports grew significantly from year to year and consistently undersold U.S. tires, the record showed that:

- The industry's capacity declined in every year of the period of investigation, falling overall by 17.8 percent by the end of the period;
- Its production decreased in every year, falling overall by 26.6 percent;
- Its U.S. shipment quantities declined in every year, falling overall by 29.7 percent;
- Its net sales quantities declined in every year, falling overall by 28.3 percent;
- Its market share fell in every year of the period, declining by 13.7 percentage points by 2008;
- The number of workers employed by the industry, wages paid, and hours worked also declined in every year of the period, falling by 14.2 percent, 12.5 percent, and 17.0 percent, respectively, by the end of the period.<sup>108</sup>

Thus, as imports increased by significant amounts in each year of the period, each of these factors declined significantly on an annual basis. This was a clear coincidence of trends for these factors.

60. Additionally, as imports increased over the period, the industry suffered declines in its profitability, capacity utilization, and productivity levels in three out of four years of the period.

---

<sup>106</sup> ITC Report, pp. 11-12. Exhibit US-1.

<sup>107</sup> ITC Report, p. 23. Exhibit US-1.

<sup>108</sup> ITC Report, pp. 15-18 and Table C-1. Exhibit US-1.

The industry's capacity utilization rate fell by 10.3 percentage points between 2004 and 2008; and its productivity fell from 2.9 tires per man-hour in 2004 to 2.5 tires per man-hour in 2008.<sup>109</sup> The industry's gross profits fell by 33.6 percent between 2004 and 2008, its operating income fell from a profit of \$ 256.2 million in 2004 to a loss of \$ 262.8 million in 2008, and its operating income margins fell from a profit of 2.4 percent in 2004 to a loss of 2.4 percent in 2008.<sup>110</sup> All of these factors, except for capacity utilization, were at their lowest levels of the period in 2008, which is precisely when the volumes and market share of Chinese imports were at their highest.<sup>111</sup> China's claim of no correlation between import trends and industry declines simply does not withstand scrutiny.

61. It is possible that China continues to believe there was no coincidence in trends because of its mistaken understanding of the record. For example, China continues to make the incorrect claim that "the various injury factors typically showed a substantial improvement in 2006-2007, when imports from China were at their highest level of the period ...."<sup>112</sup> China's argument is incorrect in two respects. First, and perhaps most important, Chinese imports were not at their highest level in 2007. They were at their highest level in 2008, which is when the U.S. industry experienced very significant declines in its condition.<sup>113</sup> Second, it is not true that the industry's overall condition improved substantially in 2007. The industry may have experienced

---

<sup>109</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>110</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>111</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>112</sup> China Second Written Submission, para. 218.

<sup>113</sup> ITC Report, Table C-1. Exhibit US-1.

improvements in its profitability and capacity utilization levels in that year, but it also experienced significant declines in its market share, capacity, production, sales, shipments, and employment levels in that year as well.<sup>114</sup> China's claim of a lack of any coincidence in trends in 2007 overlooks these simple facts.

62. China also claims incorrectly that there was no coincidence in trends between increasing import volumes and industry declines in 2008.<sup>115</sup> China asserts that there was no correlation of trends in this year because "industry conditions were at their worst while the rate of increase in imports was the lowest of the period."<sup>116</sup> Again, this claim is mistaken in two respects. First, the increase in Chinese imports in 2008 was not the lowest of the period, as China claims. The increase in Chinese imports in 2008 was actually the second highest of the period in relative terms, and was only lower than the increase in 2007, which is when Chinese imports grew at a very rapid rate.<sup>117</sup> Moreover, Chinese imports were at their absolute highest levels of the entire period in 2008, and were 10 percent higher than 2007. The increase in 2008 was, indeed, significant in that year.

63. Second, China is mistaken in claiming a lack of coincidence in 2008. In 2008, as subject imports increased by more than 10 percent over the already high levels of 2007,<sup>118</sup> virtually every

---

<sup>114</sup> ITC Report, pp. 15-18 and Table C-1. Exhibit US-1.

<sup>115</sup> *E.g.*, China Second Written Submission, para. 220.

<sup>116</sup> China Second Written Submission, para. 220.

<sup>117</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>118</sup> ITC Report, Table C-1. Exhibit US-1.

injury indicator for the industry fell.<sup>119</sup> Specifically, the industry's:

- Capacity fell by 5.0 percent;
- Shipments fell by 12.1 percent;
- Market share fell by 2.9 percentage points;
- Net sales quantities fell by 11.7 percent;
- Capacity utilization fell by 5.9 percentage points;
- Production and related workers fell by 1.9 percent, hours worked fell by 6.1 percent, and wages paid fell by 5.0 percent;
- Productivity fell by 5.3 percent;
- Operating income fell by \$770 million; and
- Operating margins fell by 6.9 percentage points.<sup>120</sup>

Obviously, there is no merit at all to China's claim of an absence of correlation in 2008.

64. Finally, China makes the legal argument that the United States is required to use a “coincidence of trends” analysis to establish the necessary causal link between imports and material injury.<sup>121</sup> As the United States has consistently explained, a “coincidence of trends” analysis is not required by the specific text of the Protocol. It is also not the only causation approach permitted under the Safeguards Agreement, the source of the reasoning China cites for

---

<sup>119</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>120</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>121</sup> China Second Written Submission, paras. 208-216.

its argument.<sup>122</sup> As the United States has explained,<sup>123</sup> under the Safeguards Agreement, even if there is no “coincidence of trends” between imports and declines in the industry’s condition, a Member can establish that there is a causal link between imports and injury by providing a compelling explanation of why a causal link exists.<sup>124</sup> Indeed, in *US – Steel Safeguards*, the Panel affirmed the ITC’s causal link analysis for certain products, even though the ITC had not performed a “coincidence of trends” analysis for the products.<sup>125</sup> In other words, it is clear that under the Safeguards Agreement or the Protocol, an authority need not perform a “coincidence of trends” analysis to establish a causal link between imports and injury.

**C. The ITC Reasonably Considered Other Factors, As Appropriate, In Its Analysis**

65. Now, we would like to make several points about the ITC’s consideration of other injury factors in its causation analysis. First, China has failed to carry its burden of establishing that several of the other factors allegedly causing injury actually caused such injury during the period of investigation. China has offered no specific evidence to establish its claim that factors like “automation for increased productivity,” “higher gasoline prices resulting in less driving,” “strikes and labor actions,” “U.S. tire producers’ high legacy costs,” or “equipment restraints” actually injured the industry during the period.<sup>126</sup> Since China has failed to present evidence and

---

<sup>122</sup> China’s Second Written Submission, para. 208.

<sup>123</sup> United States First Written Submission, paras. 235-240; United States Second Written Submission, paras. 68-70.

<sup>124</sup> *Argentina – Footwear (AB)*, paras 144-145.

<sup>125</sup> *US – Steel Safeguards (Panel)*, paras. 10.470 to 10.477 and 10.516 to 10.522.

<sup>126</sup> China Second Written Submission, paras. 337-344.

arguments sufficient to establish a presumption that the measure being challenged is inconsistent with a Member's WTO obligations,<sup>127</sup> the Panel should reject China's arguments concerning these factors.

66. China also continues to argue that demand declines during the period of investigation caused the industry's injury.<sup>128</sup> China asserts that the ITC failed to adequately address the impact of demand on the industry's condition in 2008, or the impact of demand changes during the rest of the period.<sup>129</sup> China's arguments do not withstand scrutiny. Specifically, the ITC considered whether declines in the industry's condition in 2008 were caused by the demand declines that occurred in the second half of 2008 due to the economic recession in that period.<sup>130</sup> The ITC acknowledged that apparent U.S. consumption fell in 2008 but also pointed out that the shipments of Chinese continued to grow during that market contraction.<sup>131</sup> In contrast, the ITC noted, non-subject imports declined in 2008 by 6.1 percent, roughly equivalent to the decline in apparent consumption, and that the industry's production levels fell by 11 percent in that year.<sup>132</sup> As the ITC explained, this meant that the industry "absorbed virtually all the decline in U.S. apparent consumption in that year."<sup>133</sup> Obviously, as the ITC indicates, it was not reasonable for

---

<sup>127</sup> *US – Shirts and Blouses (AB)*, pp. 14-15.

<sup>128</sup> China Second Written Submission, para. 320.

<sup>129</sup> China Second Written Submission, paras. 320-332.

<sup>130</sup> ITC Report, p. 26. Exhibit US-1.

<sup>131</sup> ITC Report, p. 26. Exhibit US-1.

<sup>132</sup> ITC Report, p. 26. Exhibit US-1.

<sup>133</sup> ITC Report, p. 26. Exhibit US-1.

the industry to absorb all of the demand decline in that year while China's imports continued to grow.

67. China also claims demand declines caused the declines in the industry's production, shipment and sales volumes in other years of the period. Again, China misstates the record. Between 2006 and 2007, for example, the industry's production, shipment and sales quantities all declined significantly, even though apparent consumption increased by 1.6 percent in that year.<sup>134</sup> Similarly, when demand declined in 2005 and 2006, the declines in apparent consumption were considerably smaller than the overall declines in the industry's production, shipments and sales quantities in each of those years.<sup>135</sup> Thus, the record shows that, throughout the period, Chinese imports entered the market in increasingly significant volumes and took market share from the industry, causing significant declines in the industry's production, shipment and sales levels, whether or not demand was increasing or declining.<sup>136</sup> China's claim that demand was the sole or primary cause of the industry's declining production, sales and market share levels is wrong.

68. Finally, China continues to assert that the declines in the industry's market share, production, shipment, and sales quantities over the period had nothing to do with the growing influence of Chinese imports but were the result of the industry's decision to voluntarily abandon the lower-end tire market.<sup>137</sup> As the United States has explained now several times,<sup>138</sup> the ITC

---

<sup>134</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>135</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>136</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>137</sup> China Second Written Submission, paras. 333-336.

<sup>138</sup> U.S. First Written Submission, paras. 306-315.

addressed this issue in detail in its determination and concluded this theory was not particularly persuasive. The record showed that Chinese imports were increasing considerably before Bridgestone, Continental, and Goodyear announced the significant plant closings in 2006 and 2008.<sup>139</sup> Specifically, by 2006, Chinese imports had increased their market share by 4.6 percentage points over the market share levels seen in 2004, and occupied 9.3 percent of the market by the end of 2006.<sup>140</sup> Indeed, in March 2006, an industry publication reported that “the overall effect [of Chinese imports] on domestic supply [had been] ‘profound’” and predicted that the impact of China on the market was “likely to remain so as imports increase.”<sup>141</sup>

69. Moreover, Bridgestone, Continental and Goodyear all reported that the closings in 2006 and 2008 were the result of pressure from low-priced imports, including those from Asia and China.<sup>142</sup> Although China claims that these statements only indicate that the companies were experiencing pressure from unidentified import sources, the record shows that, by 2006, the average prices of Chinese imports were considerably lower than all other import sources of tires, with the exception of Indonesia, an Asian country.<sup>143</sup> Given this, and given that industry reporters believed that China was having a “profound” impact on the U.S. market in the beginning of 2006, it was entirely reasonable for the ITC to find that China was one of the “low-priced” imports sources referenced by these producers when closing down their production

---

<sup>139</sup> ITC Report, p. 26. Exhibit US-1.

<sup>140</sup> ITC Report, Table C-1. Exhibit US-1.

<sup>141</sup> ITC Report, p. 27, n. 150. Exhibit US-1.

<sup>142</sup> ITC Report, p. 26 and n. 147. Exhibit US-1.

<sup>143</sup> ITC Report, Table II-1, p. II-3. Exhibit US-1. The table shows that, of the seven largest import sources for tires in 2006, China was the source with the lowest average unit values, except for Indonesia. Id.

facilities.

70. Finally, China points to the Appellate Body’s statements in *US – Cotton* to support its claim that the ITC is required to address in detail the injurious effects of other factors.<sup>144</sup> We would like to make several points on China’s argument. First, in *US – Cotton*, both the Appellate Body and the Panel acknowledged that the “serious prejudice” provisions of the Subsidies Agreement, do not “‘contain the more elaborate and precise ‘causation’ and non-attribution language’ found in the trade remedy provisions of the [Subsidies] Agreement,” the Antidumping Agreement and the Safeguards Agreement.<sup>145</sup> Accordingly, as the Panel indicated, the “absence of such detailed language, which exists elsewhere in the covered agreements, ... may be taken as a demonstration that the drafters knew how to craft a precise causation standard when they deemed it appropriate.”<sup>146</sup> Moreover, the Appellate Body stated, the absence of non-attribution language “suggests that a panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the ‘effect of a subsidy is significant price suppression under Article 6.3(c)’” of the Subsidies Agreement.<sup>147</sup>

71. As we do not need to remind the Panel, this is exactly what the United States has argued here. In our first written submission, we stated that the Protocol does not contain the same non-attribution language as that set forth in the Subsidies Agreement, the Antidumping Agreement, or

---

<sup>144</sup> China Second Written Submission, paras. 314-315.

<sup>145</sup> *US – Cotton (AB)*, para. 436; *US – Cotton (Panel)*, para. 7.1343.

<sup>146</sup> *US – Cotton (Panel)*, para. 7.1343.

<sup>147</sup> *US – Cotton (AB)*, para. 436.

the Safeguards Agreement.<sup>148</sup> As a result, we pointed out that a Member is not required to perform the specific and detailed “non-attribution” analysis the Appellate Body has found under those Agreements.<sup>149</sup> Instead, as we have argued, a Member has the discretion to adopt an appropriate and reasonable analysis to assess the effects of other factors, which will depend on the facts and circumstances of the particular case.<sup>150</sup> In other words, the *US – Cotton* findings are not inconsistent with the U.S. position on this issue, as China claims.

72. Second, we would note the Appellate Body affirmed the Panel’s consideration of four significant other injury factors in *US – Cotton*.<sup>151</sup> In its analysis, the Panel addressed each of four factors and concluded that none of the factors “attenuate the genuine and substantial link that we have found between” the U.S. subsidies and significant price suppression.<sup>152</sup> On review, the Appellate Body confirmed that the Panel adequately addressed the possible effects of these factors and reasonably concluded that they did not sever the causal link between the subsidies and price suppression.<sup>153</sup> Because the ITC’s analysis of demand and alleged business strategy was at least as detailed as the Panel’s consideration of other factors in *US – Cotton*, China has little basis for claiming that the ITC’s analysis of these issues was inadequate under the Protocol.

---

<sup>148</sup> U.S. First Written Submission, para. 298.

<sup>149</sup> U.S. First Written Submission, para. 298.

<sup>150</sup> United States First Written Submission, para. 298.

<sup>151</sup> *US – Cotton (AB)*, paras. 454-457.

<sup>152</sup> *US – Cotton (Panel)*, para. 7.1357-1363.

<sup>153</sup> *US – Cotton (AB)*, paras. 454-457.

**V. China’s Remedy Claims Are Unfounded**

73. Aside from arguing that the United States did not have a right to impose a measure, China has failed to clearly articulate why it believes the U.S. measure is inconsistent with paragraphs 16.3 and 16.6. Therefore, it has failed to meet its burden of proof on these claims. Setting aside China’s argument that the remedy imposed is inconsistent with paragraphs 16.3 and 16.6 because the United States did not have the right to impose a measure in the first place, China’s main argument seems to be that the United States did not explain or justify how it met the requirements of paragraphs 16.3 and 16.6 at the time the measure was imposed.

74. China’s first arguments fails once the United States demonstrates that its market disruption determination meets the requirements of the Protocol. China has not made a *prima facie case* of why the U.S. measure is inconsistent with paragraphs 16.3 and 16.6.

75. China’s alternative argument with respect to remedy seems to be that the United States did not explain, to China’s satisfaction, how the remedy was to the extent necessary and for the duration as may be necessary.<sup>154</sup> China’s arguments are nothing more than an improper attempt to shift the burden of proof and must be rejected.

76. China asserts that it has met its burden of proof with respect to paragraph 16.3 by “showing the absence of any proper justification for the U.S. actions due to the USITC’s failure to limit the remedy to only the effect of the imports.”<sup>155</sup> It then argues that it is the “Member imposing a remedy [that] must still demonstrate that the measure imposed was ‘only to the extent

---

<sup>154</sup> China Second Written Submission, para. 351.

<sup>155</sup> China Second Written Submission, para. 351.

necessary’.”<sup>156</sup>

77. Neither paragraph 16.3 nor paragraph 16.6 require that the Member provide a justification at the time the measure is imposed. China has not pointed to any text requiring such explanation or justification at the time of imposition. Paragraph 16.5 provides context confirming that no such obligation to explain exists. According to paragraph 16.5, a Member has to provide written notice, including the reasons for the measure and the measure’s scope and duration. Paragraph 16.5 does not require that the Member explain how the scope and duration meet the requirements of paragraphs 16.3 and 16.6 at the time the measure is imposed. Even, if it did, China did not raise a claim under paragraph 16.5.

78. Therefore, to the extent that China’s claims under paragraphs 16.3 and 16.6 are that the ITC did not sufficiently explain, China’s claims must fail. The burden remains on China to make a *prima facie* case that the additional duties do not meet the standards of paragraphs 16.3 and 16.6.

79. For the same reason, China’s arguments that the United States is limited in its explanations to what is in the ITC report, is without basis. First, the measure imposed by the United States is less restrictive than the measure recommended by the ITC. Second, since there is no obligation to provide such an explanation at the time of imposition, the United States is free to present evidence of how its measure meets the requirements of paragraphs 16.3 and 16.6.

**A. The Additional Duties are Fully Consistent with Paragraph 16.3**

80. Paragraph 16.3 authorizes a WTO Member to “withdraw concessions or otherwise to

---

<sup>156</sup> China Second Written Submission, para. 351.

limit imports *only to the extent necessary to prevent or remedy such market disruption.*”

(Emphasis added). This text tells us two things. First, it tells us what type of measure a Member may take. Paragraph 16.3 tells us that a Member may “withdraw concession” or “otherwise . . . limit imports”. “To limit imports” clearly encompasses actions that will have the effect of reducing imports from China, such as additional duties.

81. In addition, paragraph 16.3 tells us that the effect of the measure is to “prevent or remedy such market disruption.” “Prevent” means to “forestall or thwart by previous or precautionary measures;” “provide beforehand against the occurrence of (something); make impracticable or impossible by anticipatory action; stop from happening.”<sup>157</sup> “Remedy” means to “put right, reform, (a state of things); rectify, make good.”<sup>158</sup> Of course, paragraph 16.4 tells us that “market disruption” exists when imports from China are “increasing rapidly” “so as to be a significant cause of material injury.”

82. China has conceded that paragraph 16.3 does not require the investigating authority to “separate and distinguish causes”<sup>159</sup> and that there “is no specific obligation to quantify” injury.<sup>160</sup> The United States agrees. Given China’s acknowledgment that paragraph 16.3 does not require a quantification of injury, it is puzzling that it argues that the obligation “limits the extent of any such safeguard measures to ‘such’ market disruption, which is limited to that disruption properly

---

<sup>157</sup> New Shorter Oxford English Dictionary, p. 2348.

<sup>158</sup> New Shorter Oxford English Dictionary, p. 2540.

<sup>159</sup> China’s Answers to Panel Questions, para. 70.

<sup>160</sup> China’s Answers to Panel Questions, para. 71.

attributed as having been significantly caused by rapidly increasing imports from China.”<sup>161</sup> It appears that China is arguing that the word “such” implies some form of quantification. However, the plain meaning is that “such market disruption” merely refers to the fact that an investigating authority must have found there to be market disruption.

83. Nor can a quantification requirement be found either in the phrase “to the extent necessary.” We note that the word “necessary” is linked to “prevent or remedy”. The need for relief is what makes the measure necessary. Therefore, this means that a measure under the transitional mechanism is permissible if it remedies the material injury caused by rapidly increasing imports from China.

84. One reason why it may not be possible to quantify injury is that the different factors that an investigating authority may look at to determine injury are measured in different units - market share and capacity utilization in percentages, level of sales and production in units, profits and losses in value (or percentages), and employment in number of workers or hours worked. It is not possible to aggregate these factors into a single quantification of injury. In addition, the factors most indicative of the condition of an industry may differ case by case. For example, in some cases reductions in employment may be particularly indicative of injury. By contrast, in others, reductions in research and development expenditures may be particularly indicative of injury.

85. Any analysis will at best provide an approximation, or a range, that will allow the Member to evaluate whether the remedy is no more than “to the extent necessary to prevent or

---

<sup>161</sup> China Second Written Submission, para. 349.

remedy the market disruption.” If imports from China have been found to be “a significant cause” of market disruption, then a limitation on such imports is permissible. A Member that has determined there is market disruption will seek to determine the range of effects from various remedy options. On one hand, the Member will want to know at which level relief would be ineffective because it would not limit imports enough to remedy the market disruption found to exist. On the other hand, to the extent that there may have been other causes at play, the remedy should not aim to prohibit all imports from China. A Member is likely to end up with a range of remedy options.

86. In this case, China has not argued - because it can not - that the additional tariffs are prohibitive. As we have demonstrated, the ITC, in its remedy analysis and recommendation, rejected petitioner’s proposed remedy because its effect would be higher than necessary to remedy the market disruption.<sup>162</sup> In our answer to the Panel’s question on remedy, we have provided specific references to the ITC’s analysis regarding how the remedy would address the market disruption found.<sup>163</sup> For example, we note Chairman Aranoff’s description of her analysis:

In determining what remedy to propose, I took into account the nature of the market disruption that I have found to exist - specifically the rapid increase in imports of subject tires from China, the large absolute volume of those imports, and the underselling by the imports. It is my view that, in order to be effective, a remedy must address and alleviate

---

<sup>162</sup> ITC Report, p. 36 and n. 200. Exhibit US-1.

<sup>163</sup> U.S. Answers to Panel Questions, paras. 84-92.

these specific elements of market disruption, by reducing the volume of imports from China in the U.S. market and raising the prices of the remaining volume of such imports in an effective way and for an effective period of time.<sup>164</sup>

From her perspective, the remedy recommended achieves this result because it has the effect of addressing the factors identified: “a 55 percent additional tariff in the first year would reduce the volume of subject imports from China by 33 to 58 percent, and would raise prices of subject imports from China by 12 to 23 percent. This would have the effect of reducing market share of subject imports to 7.3 to 10.6 percent (from 16.7 percent), based on the quantity of apparent consumption in 2008, and of largely negating the average underselling margins of 23.6 percent associated with subject imports in 2008.”<sup>165</sup>

87. In addition, as we have mentioned before, the measure actually imposed by the United States was 20 percentage points lower than the ITC’s recommended measure for the first year, to be reduced by five percentage points on the second and third years. Therefore, the expected effect should be less and lessen over the duration of the remedy.

88. China has not provided any evidence of how the measure is inconsistent with paragraph 16.3. We have already explained, to the extent China’s argument is that the United States did not explain how its measure met the requirements of paragraph 16.3, there is no such requirement. Therefore, China’s claim under paragraph 16.3 must fail.

---

<sup>164</sup> ITC Report, p. 40. Exhibit US-1.

<sup>165</sup> ITC Report, p. 40. Exhibit US-1.

**B. The Additional Duties Are Fully Consistent with Paragraph 16.6**

89. Paragraph 16.6 provides that a Member can apply a measure under the transitional mechanism “only for such period of time as may be necessary to prevent or remedy the market disruption.” In its second written submission, China argues that because the ITC did not quantify the effect Chinese imports were having it is “virtually impossible for a remedy to comply with Article 16.6's requirement.”<sup>166</sup> Once again we note that China has conceded that there is no requirement to quantify with respect to paragraph 16.3, and we understand this to apply with respect to paragraph 16.6 as well. Therefore, it is not clear why a failure to quantify could mean there has been a violation of paragraph 16.6.

90. Note that the first sentence of paragraph 16.6 is drafted in terms of how long a Member “shall apply a measure.” This confirms an interpretation that this first sentence is not intended to require precision at the time the measure is imposed, but that there has to be a limit and that at such time as the measure may no longer be necessary, it will be removed.

91. This is further reinforced by the next two sentences of paragraph 16.6. These sentences allow China to suspend concessions substantially equivalent to any safeguard measure two years after its application if there was a relative increase in imports and three years after application if there was an absolute increase. These indicate that the negotiators of the Protocol envisaged safeguard measures remaining in place for at least three years if there was an absolute increase in Chinese imports, as was the case with regard to tires. Indeed, they could remain in place even longer, except that the Member imposing the measure would be subject to retaliation by China.

---

<sup>166</sup> China Second Written Submission, para. 361.

China has tried to dismiss these provisions as “rights that China has under certain circumstances,”<sup>167</sup> but that does not diminish their utility as context for the first sentence of paragraph 16.6 or as an indication of the expectations of the negotiators of the Protocol.

92. Aside from arguing that the United States did not have the right to impose the additional duties in the first place, China has not made any arguments or provided any evidence that the measure has been in place for longer than necessary. Therefore, China’s claim under paragraph 16.6 must be rejected.

---

<sup>167</sup> China First Written Submission, para. 399.